STATE OF MICHIGAN

COURT OF APPEALS

ROSE MARIE CONANT,

Plaintiff-Appellee,

v

BRIAN SCOT CONANT,

Defendant-Appellant.

UNPUBLISHED
April 23, 1999

No. 213615
Calhoun Circuit Court
LC No. 95-003129 DM

Before: Holbrook, Jr., P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's denial of his petition for a change of custody of the parties' minor child from joint physical custody to defendant having sole physical custody with supervised visitation for plaintiff. We affirm.

I

The parties were divorced on May 2, 1997. The parties were awarded joint physical custody of their then four year old daughter, with defendant to have custody two and one-half days per week, and plaintiff the balance. Defendant alleged that while his daughter was at plaintiff's home, the girl was either being sexually abused by plaintiff's fourteen-year-old stepson, or had been exposed to the sexual activity of others. The allegations were investigated by Children's Protective Services (CPS). Eventually, CPS closed the case after concluding that the allegations of sexual abuse could not be substantiated. Defendant filed his petition on December 8, 1997. Following a hearing, the trial court issued an order dated December 16, 1997, restricting any unsupervised contact between the parties' daughter and her stepbrother. Finally, in an opinion and order filed on July 13, 1998, the trial court denied defendant's petition, ordered that contact between the girl and her stepbrother continue to be restricted, and ordered that the parties and plaintiff's two stepchildren participate in family counseling.[1]

II

Defendant first contends the trial court committed clear error in concluding that an established custodial environment existed with both parents. We disagree. Section 7(1)(c) of the Child Custody

Act[2] states that "[t]he custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c); MSA 25.312(7)(1)(c). Whether an established custodial environment exists is a question of fact. *Ireland v Smith*, 214 Mich App 235, 241; 542 NW2d 344 (1995). "Findings of fact in a child custody case are reviewed under the great weight of the evidence standard. Under that standard, the trial court's findings will be sustained unless the evidence clearly preponderates in the opposite direction." *Id.* at 242.

Defendant claims that the "frequent and repeated changes" in custody between the parties resulted in there being no established custodial environment in either party. Although it is not clear, the "changes" defendant refers to appear to be the regular, rotating schedule of physical custody worked out at the time of the divorce. We are not persuaded by defendant's argument. The fact that a child splits time between two divorced parents is not, by itself, enough to establish that no custodial environment exists. Indeed, a child can establish custodial environments with both parents following a divorce. See *Nielsen v Nielsen*, 163 Mich App 430, 433-434; 415 NW2d 6 (1987).

We are also unpersuaded by defendant's contention that the existence of the present custody dispute precludes a finding that a custodial environment had been established. The existence of a custody dispute may be a factor in determining whether an established custodial environment exists only if it creates uncertainty on the part of the child. See *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). No evidence of such uncertainty exists in the record before us.

Additionally, we reject defendant's assertion that uncertainty in the existence of an established custodial environment was created by the evidence of several experts who, defendant asserts, recommended that defendant be given custody. Not only are such recommendations not among the factors the court must examine to determine whether an established custodial environment exists, see MCL 722.27(1)(c); MSA 25.312(7)(1)(c), but we find no instances in the record where any expert specifically indicated that defendant should be given sole physical custody of the parties' minor child.

III

Defendant also contends that the trial court erred in not asking the girl about her preference with respect to custody. We disagree. MCL 722.23(i); MSA 25.312(3)(i) calls for the court to consider, evaluate and determine the reasonable preference of the child, "if the court considers the child to be of sufficient age to express preference." The court found that the child was not of sufficient age to express a preference that would be deserving of a significant amount of weight. We are not convinced that this finding was erroneous. Further, the court noted that even if this factor were found in defendant's favor, it would not change the outcome of the case, "given the other evidence presented and [defendant's] burden of proof." Accordingly, we conclude that the court's decision not to interview the child does not amount to error requiring reversal. See *Treutle v Treutle*, 197 Mich App 690, 695-696; 495 NW2d 836 (1992).

IV

Defendant also asserts that the trial court abused its discretion in denying his petition. We disagree. In child custody disputes, the best interests of the child control resolution of the dispute. MCL 722.25; MSA 25.312(5); *Harper v Harper*, 199 Mich App 409, 417; 502 NW2d 731 (1993). The best interests of the child are to be determined through a review of the factors listed in MCL 722.23; MSA 25.312(3). *Fletcher v Fletcher*, 447 Mich 871, 882; 526 NW2d 889 (1994). The court found the parties equal on eight of the ten best interests factors for which the court stated its findings.[3] Regarding factor c (material needs, including food, clothing, and medical care) and factor d (stable environment), the court found that they weighed in defendant's favor. As previously noted, see *supra* discussion part III, the court decided that it would not ask the girl about her preference regarding custody.

Defendant does not specifically challenge the court's findings and conclusion with respect to any of the best interests factors. Rather, defendant argues that the court's decision regarding custody was erroneous, given that there was clear and convincing evidence presented that the child had been either sexually abused or had witnessed sexual acts performed by others in plaintiff's household. We disagree. After having reviewed the evidence presented to the trial court, and acknowledging the trial court's superior ability to judge the credibility of the witnesses that appeared before it, *Fletcher v Fletcher*, 229 Mich App 19, 25; 581 NW2d 11 (1998), we cannot conclude that the trial court erred when it found that the evidence of sexual abuse or sexually inappropriate behavior was inconclusive. Accordingly, we see no abuse of discretion in the court's denial of defendant's petition to change custody.

V

Additionally, defendant argues that he was denied his constitutional right to cross-examination when the trial court denied his motion to discover the raw test results of a personality inventory given to the stepbrother by psychologist Dr. Martha Loomis Kendall. We disagree. By statute, privileged statements made to psychologists shall not be disclosed unless certain enumerated statutory exceptions apply, MCL 330.1750(2); MSA 14.800(750)(2), or unless the privilege is "voluntarily waived," "waived by operation of law," or when disclosure is "justified by the supervening interests of society, a third party, or the patient." *Saur v Probes*, 190 Mich App 636, 639-640; 476 NW2d 496 (1991). Defendant has failed to establish that any of the above exceptions apply in the case before us.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy
/s/ Michael J. Talbot

[1] The court ordered that the restrictions regarding contact between the parties' daughter and plaintiff's stepson would remain until the psychologist directing the ordered family therapy sessions concluded that the restriction was no longer necessary.

[2] MCL 722.21 *et seq.*; MSA 25.312(1) *et seq.*

[3] The trial court's opinion does not include a reference to factor e ("The permanence, as a family unit, of the existing or proposed custodial home or homes") or factor *l* ("Any other factor considered . . . to be relevant"). Regarding factor *l*, we assume that the trial court did not find that there was any other factor that should be separately considered. Further, we note that although it was not separately addressed as an independent best interests factor in the opinion, the trial court did consider the allegations of sexual abuse when rendering its decision. As for the failure to state findings with regard to factor e, we conclude that this error was harmless. After reviewing the record, we conclude that the parties are equal with respect to this factor. We find no evidence that the respective family units were in danger of splitting up, regardless of the outcome of the custody dispute.